

REMARKS

Claims 1-28 were pending prior to this amendment. Claims 1-28 were rejected. Claims 1-12 and 14-18 have been amended. Claims 13 and 20-27 have been cancelled. New claims 29-42 have been added. At least in light of the above amendments and the foregoing remarks, reconsideration and allowance of the claims is respectfully requested.

October 24, 2007 telephone interview

A telephone interview was conducted between Attorney Michael Cofield and Examiner Tiv on October 24, 2007. During the telephone interview, the Examiner clarified the basis for the rejection of claim 28, specifically the basis for the belief that the following feature is taught by Curley:

“...the network device configured to mimic a customer interaction with the electronic commerce servers to determine current performance of an electronic commerce application operating in the enterprise network...”.

Referring to FIG. 2 of Curley, the Examiner stated that the network monitor 16A analyzing the transaction between client 10A and server 14A was the basis for the rejection. The Examiner alleged that the network monitor 16A mimics a customer transaction, or alternatively that if the network monitor 16A does not mimic a customer transaction, such functionality would be an obvious modification to Curley.

Applicant pointed out that the network monitor is configured for observation of a remotely generated data flow, and for generating performance indications based on the observation. *See* Curley, Abstract, first sentence, also see paragraphs 11 and 16. To the extent the Examiner is taking the position the above cited claim language is so broad that it encompasses generating performance indications based on third party observation of a data flow or other similar functionality, the position required to justify the rejection legally misconstrues the scope of claim 28. *See* MPEP 2111.01, paragraph III. A mid-call path device generating performance indications based on observing a data flow is not a mid-call path device mimicking a customer interaction with the electronic commerce servers to determine current performance of an electronic commerce application *because such behavior is not mimicking any behavior by the client 10A.*

As to the alternative argument, namely that the network monitor 16A does not perform the above cited functionality but that it would be an obvious modification based on Klassen, Applicant points out that this is a new rejection that is different than the rejection on the record. See the Office Action, page 4, first paragraph indicating that the above cited feature is taught by Curley. The Office Action did not allege where this feature is disclosed in Klassen, nor did the Office Action allege any motivation for this newly proposed modification to Curley. Furthermore, the basis that was absent from the Office Action was not clearly indicated during the telephone interview. Applicant was denied its request for a follow up interview to clearly identify both 1) where such feature was allegedly disclosed in Klassen and 2) the alleged motivation for the proposed modification.

To further prosecution, even though the basis for the new rejection described during the telephone call has not been added to the record or clearly identified to Applicant, Applicant has reviewed Klassen in an attempt to anticipate the basis for such a new rejection. Applicant finds no such basis, because, referring to FIG. 1 of Klassen, the communications network 20 does not describe any devices located on a communication path between the stations, and even if it did (which it does not), there is no disclosure of such alleged device mimicking a customer transaction between the stations.

During the telephone interview, the Examiner did suggest that Applicant add new dependent claims according to page 21, lines 4-16 of the present specification. Applicant thanks the Examiner for the suggestion, and directs the Examiner's attention to new claims 29-34.

During the telephone interview, Applicant and the Examiner also discussed the subject matter of newly proposed claims 1-12, which were sent to the Examiner by way of an October 22, 2007 facsimile. The Examiner tentatively agreed that the newly claimed features included in these claims is not disclosed in the cited references of record, and therefore a new search would be required to evaluate the allowability of these claims. Applicant thanks the Examiner for considering the proposed claim amendments.

Claim Rejections – 35 U.S.C. § 103

Claims 1, 13, 20, 27 and 28 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over Curley et al., U.S. Patent Application Publication No. 2002/0120727 ("Curley") in view of Klassen et al., U.S. Patent No. 6,711,137 ("Klassen").

Claim 1 has been amended. The amendments are supported by at least FIG. 3 and the corresponding text describing FIG.3. Claim 1 should be allowed for at least some of the reasons indicated in the summary of the telephone interview. Additionally, Applicant notes that even if the monitoring device 16A in Curley did perform the claimed transaction mimicking (which it does not), said alleged mimicking does not measure performance of an electronic commerce application independently of network conditions outside the enterprise network. Thus, claim 1 should be allowed. Claims 13, 20 and 27 have been cancelled. Claim 28 should be allowed for at least the reasons indicated in the summary of the telephone interview.

Claims 2, 4-7, 14, 16, 17, 21, 23 and 24 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over Curley and Klassen, and further in view of Rakoshitz et al., U.S. Patent No. 6,578,077 (“Rakoshitz”).

Claims 2 and 4-7 are dependent and should be allowed for at least the same reason as their base claim. Claim 14 has been amended and should be allowed for at least similar reasons as claims 1 and 28, namely, none of the cited references teaches at least the feature of the computer to transmit an application test from said computer system to said electronic commerce servers, wherein said application test is selected to represent at least a portion of said electronic commerce transactions. Claims 16 and 17 are dependent and should also be allowed. Claims 21, 23 and 24 have been cancelled.

Claims 8-12, 18, 19, 25 and 26 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over Curley, Klassen, and Rakoshitz, and further in view of Scarlat et al., U.S. Patent No. 6,477,483 (“Scarlat”).

Claims 8-12, 18 and 19 are dependent and should be allowed for at least the same reasons as their base claims. Claims 25 and 26 have been cancelled.

Claims 3, 15 and 22 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over Curley and Klassen, further in view of Rakoshitz, and further in view of admitted prior art.

Claims 3 and 15 are dependent and should be allowed for at least the same reason as their base claims. Claim 22 has been cancelled.

New claims

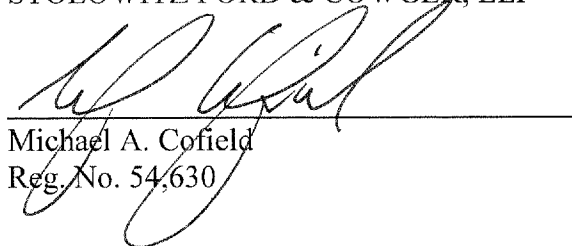
New claims 29-42 should be allowed for at least similar reasons as claim 1.

CONCLUSION

For the foregoing reasons, reconsideration and allowance of all pending claims is requested. The Examiner is encouraged to telephone the undersigned at 503-224-2170 if it appears that an interview would be helpful in advancing the case.

Respectfully submitted,

STOLOWITZ FORD & COWGER, LLP



Michael A. Cofield
Reg. No. 54,630

STOLOWITZ FORD COWGER LLP
621 SW Morrison Street, Suite 600
Portland, Oregon 97205

Customer No. 73552